UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	
S & S Auto Sales, Inc.	)	**Docket No. CAA-5-99-026**
Milwaukee, Wisconsin	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

The Complainant, Chief, Pesticides and Toxics Branch, United States Environmental Protection Agency (EPA) filed a Motion for Default Order requesting that a Default Order be entered against the Respondent, S & S Auto Sales, Inc. (S&S), assessing a civil administrative penalty of Eight Thousand Five Dollars ($8,005). Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Penalty Calculation, the Complainant's Motion for Default Order is hereby GRANTED. However, for the reasons discussed below, the penalty assessed is Five Thousand Five Hundred Five Dollars ($5,505).

Background

This civil administrative action was instituted pursuant to Section 113(d) of the Clean Air Act (Act), 42 U.S.C. § 7413(d), and the Consolidated Rules. On August 17, 1999, a Complaint was filed against the Respondent alleging violations of the Act. The specific allegations are that the Respondent failed to use properly trained and certified technicians to charge motor vehicle air conditioners; the Respondent failed to retrofit the motor vehicle air conditioners with

appropriate fittings and the Respondent failed to place required labels on the motor vehicle air conditioners. A civil penalty of Eight Thousand Five Dollars ($8,005) was proposed in the Complaint.

The Complaint issued to the Respondent, states on page 8, in the section headed "Answer" that, "To avoid being found in default, you must file a written Answer to this Complaint with the Regional Hearing Clerk within 30 calendar days of your receipt of this Complaint.....Failure to deny any factual allegation in this Complaint shall constitute an admission of the alleged fact. If you fail to file a written Answer within 30 calendar days of your receipt of this Complaint, the Administrator of U.S. EPA may issue a Default Order. Issuance of a Default Order will constitute a binding admission of all facts alleged in the Complaint and a waiver of your right to a hearing (40 C.F.R. § 22.17). The civil penalty proposed herein shall become due and payable without further proceedings 60 days after the Default Order becomes the Final Order of the Administrator pursuant to 40 C.F.R §§ 22.27 or 22.31."

The Complaint was sent by certified mail and signed for by the Respondent on August 19, 1999. EPA has produced the certified mail return receipt card evidencing proper service.

On or about September 23, 1999, the Complainant received a letter purporting to be from an individual representative of the Respondent. The letter is not an "Answer," as it does not clearly and directly admit, deny or explain each of the factual allegations in the Complaint with regard to which the Respondent has any knowledge. 40 C.F.R. § 22.15. On or about June 16, 2000, the Complainant received a copy of a document purporting to have been filed with the State of Wisconsin and purporting to be Articles of Dissolution for the Respondent corporation. At no time between August 19, 1999, and the present has the Respondent provided the

Complainant with a copy of the notice to claimants described in Wis. Stat. § 180.1406 for the disposition of known claims against dissolved corporations, nor did the Respondent otherwise inform the Complainant that it was dissolving its corporate status. The Complainant simply received the Articles of Dissolution on or about June 16, 2000.

To date, the Respondent has failed to file an Answer to the Complaint.

On September 1, 2000, the Complainant filed Complainant's Motion for Default Order. It was served on the Respondent by Certified Mail and First Class Mail. On November 6, 2000, the Regional Judicial Officer issued an Order to Substantiate Penalty Calculation. On November 28, 2000, the Complainant filed an Affidavit in Support of Complainant's Penalty Demand (Affidavit).

To date, the Respondent has failed to file a Response to the Motion for Default Order.

Findings of Violation

The following allegations in the Complaint are deemed admitted:

1. On August 17, 1999, EPA filed an administrative complaint against the Respondent S & S Auto Sales, Inc., alleging violation of Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), and the regulations promulgated thereunder.

2. The Respondent is a Wisconsin corporation which repairs or services motor vehicles.

3. The Respondent purchased three cylinders of McCool Chill-It, a Class II ozone depleting refrigerant substitute blend.

4. Between June 1, 1998, and August 31, 1998, S & S charged 12 to 15 motor vehicle air conditioners with McCool Chill-It.

5. S & S did not use properly trained and certified technicians to charge the motor

vehicle air conditioners with McCool Chill-It.

6. S & S did not retrofit the motor vehicle air conditioners, that had been charged with McCool Chill-It, with appropriate fittings.

7. S & S did not place the required labels on the motor vehicle air conditioners that had been charged with McCool Chill-It.

The record also supports the following findings:

8. The Complaint was served by certified mail; the return receipt card was signed.

9. The Respondent has failed to file an Answer to the Complaint.

10. The Respondent was served with a Motion for Default Order.

11. The Respondent has failed to respond to the Motion for Default Order.

Conclusions of Law

1. Jurisdiction for this action was conferred upon EPA by Section 113(d) of the Clean Air Act, 42 U.S.C § 7413(d).

2. The Respondent is a "person" for purposes of the Act.

3. The Respondent was properly served the Complaint.

4. The Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. § § 22.17(a) and 22.15(d).

5. McCool Chill-It is a Class II ozone depleting refrigerant substitute blend. See 42 U.S.C. § 7671a(b).

6. Each instance in which S & S serviced a motor vehicle air conditioner with McCool Chill-It without using a properly trained and certified technician is a violation of Section 609(c)

of the Act, 42 U.S.C. § 7671h, and 40 C.F.R. § 82.42(a)(1).

7. Each instance in which S & S failed to install the required unique fittings on a motor vehicle air conditioner it charged with McCool Chill-It is a violation of 40 C.F.R. § 82.174(c).

8. Each instance in which S & S failed to apply a warning label to a motor vehicle air conditioner it charged with McCool Chill-It is a violation of 40 C.F.R. § 82.174(c).

9. Section 113(d) of the Act authorizes a civil penalty of up to $27,500 per day for each violation of Section 609 of the Act and for violation of regulations promulgated pursuant to Section 612.

10. The Respondent's failure to file a timely Answer to the Complaint or otherwise respond to the Complaint, is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violations described above.

Penalty Calculation

Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 7413(e)(1), sets forth statutory penalty factors to consider in assessing a civil penalty under Section 113. These factors include "the size of business, the economic impact of the penalty, the violator's full compliance history and good faith efforts to comply, the duration of the violation, the violator's payment of any penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violations and other factors as justice may require." To implement these statutory penalty factors in a consistent nationwide manner, EPA has issued the "*Stationary Source Penalty Policy*," dated October, 1991 (Stationary Source Penalty Policy). EPA has also issued *"Appendix IX: Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving Refrigerant or Who Sell*

Small Containers of Refrigerant in Violation of 40 C.F.R. 82, Protection of the Stratospheric Zone, Subpart B: Servicing of Motor Vehicle Air Conditioners," dated July 23, 1993 (July 1993 Penalty Policy).

In its Affidavit in Support of Complainant's Penalty Demand, the Complainant states that the $8,005 penalty initially proposed in the Complaint was calculated by using the July 1993 Penalty Policy. However, upon reevaluation, using the more current information concerning dissolution of the corporation, the proposed penalty assessment was recalculated to reflect reduction in business size. In conformity with the July 1993 Penalty Policy, EPA currently proposes a penalty of $5,505.[1] The penalty calculation is as follows:

Gravity Component - Since EPA had information that the Respondent had charged 12 to 15 motor vehicle air conditioners with McCool Chill-It, $5,000 was assessed for failure to use properly trained technicians. Using the lower number of 12 vehicles, EPA proposed a penalty of $40 for each motor vehicle serviced without using approved refrigerant recycling or recovery equipment, for a total of $480.

Size of Business- In the initially proposed penalty, using information from Dun & Bradstreet concerning the Respondent's net worth, the Complainant assessed $2,500 to scale the penalty to the size of the violator. As part of preparing the Affidavit, EPA reviewed the penalty assessment taking into consideration a 1999 federal income tax return, showing a net loss, which

---

[1] The Respondent was served with the Affidavit in Support of Complainant's Penalty Demand, which reduced the penalty request from $8,005 to $5,505, by certified mail. The Respondent has not responded to the Affidavit in any manner, indicating neither agreement or disagreement with the modification. Due process has been met, as the Respondent had notice of the reduction and had the opportunity to respond to it. It restates the obvious to note that the recalculation and reduction benefit the Respondent.

had been appended to the Articles of Dissolution. In the Affidavit, which explains and supports the revised proposed penalty, there is no penalty component for size of business.

Economic Benefit- EPA proposed the economic benefit as $25, mid-range of the $15 to $35 fee charged by certification programs.

EPA's proposed recalculated penalty is as follows:

Gravity		
Failure to use certified technician		$5,000
Failure to use required equipment		480
Economic Benefit		25
	TOTAL	$5505

I have determined that the recalculated penalty is supported by the record. The recalculated penalty is appropriate based upon the criteria set forth in Section 113(d) of the Clean Air Act and the applicable penalty policies.

Default Order

The Respondent is hereby ORDERED as follows:

A. The Respondent is assessed a civil penalty in the amount of Five Thousand Five Hundred Five Dollars ($5,505).

B. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States of America" within thirty (30) days after the effective date of the final order. 40 C.F.R. 22.31(c). Such payment shall be remitted directly to:

U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

C. A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-

19J) and Counsel for the Complainant (Mail Code C-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

D. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings *within thirty (30) days from the date of service provided in the certificate of service accompanying this order,* (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated: 3/15/01

/S/
Norman Neidergang for
David A. Ullrich
Acting Regional Administrator

Prepared by Regina Kossek, Regional Judicial Officer